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THE REQUIREMENT OF EXACTNESS IN THE JUSTIFICATION OF PRICE AND SERVICE DIFFERENTIALS UNDER THE ROBINSON-PATMAN ACT

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I. BACKGROUND OF THE PROBLEM

A long road and two economic revolutions lie between the policies as to price which accompanied the rise of the early common law and those that find expression in the Robinson-Patman Act of 1936.¹ Those who were concerned with medieval markets, where craftsmen or traders brought their wares, were unfamiliar with the impersonal commodity exchanges of modern times or with "discrimination" and f.o.b. pricing, which presuppose announced or quoted prices and an available transportation system. Personal higgling and delivered pricing were the order of the day.² The price in a particular transaction or class of transactions was "just," fair, or reasonable, as it was required to be, for either of three reasons: because it was established by authority, was in accord with custom, or, increasingly, was agreed upon by the parties.³

*Professor of Law, Indiana University. The author records his thanks to members of his 1949-50 seminar in Antitrust at Indiana University, who made inquiries into some phases of this subject, and particularly to Owen Sheridan, Esq., who prepared helpful material on the accounting aspects.

¹49 STAT. 1526 (1936), 15 U.S.C. § 13 (1946).

²Watkins, *Price Discrimination* in 12 ENCYC. SOC. SCI. 350 (1934).

³As to the medieval ideology with regard to price, which was evolved by theologians and perfected by St. Thomas Aquinas, see ASHLEY, AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY, PART I 132-48 (4th ed. 1919). According to this ideology, a price should be sufficient to maintain those whose services entered into a product according to their stations in life, and no more. Like modern economic theory, however (see Gordon, *Short-period Price Determination in Theory and Practice*, 38 AM. ECON. REV. 265 [1948]), the medieval theory was far removed from day-to-day happenings, however valuable it might have been as a statement of ideals or of long-term trends. Even price-fixing legislation, which was common, did not embody it in any recognizable way. "The more the enactments are examined, the more does it become clear that they are based, not on the Aristotelian doctrine of moralists but on practical experience of bargaining about different kinds of commodities in the market or the fair." CUNNINGHAM, THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE DURING THE EARLY AND MIDDLE AGES 250 (1890). As to the rise of competition as a determining factor, see *id.* at 405-07.

The widened markets brought by the Commercial Revolution introduced competition for business among sellers and among buyers in place of custom and the higgling of parties as the principal determinant of prices; and its seeming inexorability identified it in the minds of men with economic "laws." These were supposed to operate perfectly when conditions were favorable, but sometimes with temporary distortion, to produce prices that were economically "right." According to recent theory, prices reach "equilibrium" at levels which match marginal production costs with marginal consumer monetary demand. As the development of communication took place, it facilitated price offers and quotations and enhanced the expectation that prices in different transactions in wide markets for the same commodities would be uniform.

The Industrial Revolution with its attendant growth of large corporations and reduction in the number of traders in many commodities, however, brought into prominence new situations in which competition among sellers and among buyers failed to hold prices in line. There arose, rather, new forms of manipulation by powerful dealers, yielding significant advantage not only in single transactions but over periods of time. These advantages became of especial public concern when, as was frequently the case, they tended toward monopoly in the hands of traders able to strengthen their market positions by reason of the concessions they gave or received.⁴ Apart from this factor, however, the ethical conception of equal treatment for all, which attached itself to the "one-price" norm, called to an undefined extent for vindication as against contrary practices.⁵

⁴The receipt of railroad rate rebates and favorable prices from suppliers which characterized the rise of the "trusts," and their use of local price cutting to squeeze out smaller competitors, are a familiar feature of the history of American trusts and monopolies. See Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 Col. L. Rev. 179, 245-50 (1932), for a summary of this and other aspects of those business combinations that were challenged under the anti-trust laws during the first 40 years after enactment of the Sherman Act.

⁵The significance of this factor is hard to estimate. It is hardly as strong elsewhere as in retail trade. Appeals are occasionally made, however, to "good old-fashioned competition in which a seller reduces his mill or shop prices, uniformly, to all buyers in order to find a selling outlet. This is real competition. It is good and honest competition." Testimony of Rankin Peck, President, National Congress of Petroleum Retailers, *Hearings before House Select Committee on Small Business on Functional Operation of the Federal Trade Commission*, 81st Cong., 2d Sess. 92 (1950). On the other hand, selling or buying goods opportunistically to the best advantage wherever opportunity offers, regardless of equality, is a time-honored practice. See the example given in Fulda, *Food Distribution in the United States, the Struggle Between Independents and Chains*, 99 U. Pa. L. Rev. 1051, 1109 (1951).

The story has often been told of the enactment first of Section 2 of the Clayton Act⁶ and then of the amendatory Robinson-Patman Act⁷ in an effort to control discriminatory pricing in interstate commerce having a bearing on the monopoly problem. Less familiar, but emerging with increasing clarity in recent discussions, are certain operative factors attendant upon the resulting rule of price equality, except as specifically justified, under this legislation. These bring into sharp focus the questions of whether a material sacrifice is to be made by consumers in order to maintain an orderly competitive system under the rule and, if so, what the extent of the sacrifice is to be. To these factors attention will be given here. Primary attention will be given to proceedings of the Federal Trade Commission, upon which the principal burden of enforcing the Act falls.

II. THE TERMS OF THE STATUTE

The intent of the statute seems clear from its wording. Sellers of commodities in interstate commerce are not to discriminate in price among purchasers of like grade and quality, "where the effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them"; but "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered" are permitted.⁸ Payments are not to be made or contracted to be made by sellers to purchasers of commodities in interstate commerce for "services or facilities furnished by or through" the customer in the "processing, handling, sale, or offering

⁶The original provision, 38 STAT. 730 (1914), was directed primarily against predatory, discriminatory price-cutting by sellers which enabled them to capture customers from competitors without a general lowering of the seller's prices on the same products. AUSTIN, *PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT* 6 (1950). The provision was, however, held to be broad enough to outlaw discrimination which tended to create a monopoly on the part of a favored buyer. *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245 (1929).

⁷The drive for this legislation came from the participants in the "orthodox" channels of distribution (wholesalers, retailers, and brokers) who desired protection against various forms of price concessions by manufacturers and processors to large buyers, representing alternative channels of distribution—notably chain stores and mail order houses, which were absorbing an increasing share of available business. AUSTIN, *op. cit. supra* note 6, at 7-11; Fulda, *supra* note 5, at 1082-1109; Gould, *Legislative Intervention in the Conflict Between Orthodoxy and Direct-Selling Distribution Channels*, 8 LAW & CONTEMP. PROB. 318 (1941).

⁸49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946).

for sale" of a commodity, "unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities"; nor are services or facilities of a similar variety to be made available by sellers to purchasers "upon terms not accorded to all purchasers on proportionally equal terms."⁹ Hence it would appear that, despite the rule of equality as to price, all means of economy in the manufacture, sale, and delivery of goods and all aids to distribution and merchandising may be employed where feasible and may be reflected in prices and other terms accorded to particular customers to whose business they relate, so long as price differentials do not go beyond reflecting actual savings and so long as services by sellers to buyers and allowances for services of customers are proportionally available to all who compete in the same market. In so far as money-saving means of distribution are employed and the benefits are passed on to subsequent buyers, consumers will in the end benefit. "Orthodox" channels of distribution are not protected against the intrusion of alternative methods, if the latter result in increased efficiency or in services or sales devices which "pay off."

Two definite exceptions and one which is doubtful emerge in the statute. One forbids the payment or receipt of any "commission, brokerage, or other compensation" from one party in a transaction of "sale or purchase of goods, wares, or merchandise" in interstate commerce "to the other party . . . or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."¹⁰ The prohibition is absolute, with-

⁹49 STAT. 1527 (1936), 15 U.S.C. § 13(d) and (e) (1946). Paragraph (f) of the same section makes it unlawful for a purchaser in interstate commerce knowingly to induce or receive a prohibited discrimination in price.

¹⁰49 STAT. 1527 (1936), 15 U.S.C. § 13(c) (1946). This paragraph also contains a provision apparently permitting all payments or allowances for "services rendered" in connection with a transaction; but it has been held that this provision refers only to the services of an independent representative of the person making payment or allowance, thus avoiding emasculation of the paragraph. *Great A. & P. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938); *Oliver Bros., Inc. v. FTC*, 102 F.2d 763 (4th Cir. 1939). See the Commission's decisions in *National Modes, Inc.*, 3 CCH TRADE REG. REP. ¶ 14,323 (FTC 1950); *Hesmer, Inc.*, 3 CCH TRADE REG. REP. ¶ 14,645 (FTC 1951); *Pacific Gamble Robinson Co.*, 3 CCH TRADE REG. REP. ¶ 14,670 (FTC 1951). Cooperative buying organizations established by "independents," as well as chain stores and their subsidiary brokerage concerns, come under the prohibitions of the paragraph. *Quality Bakers of America v. FTC*, 114 F.2d 393 (1st Cir. 1940); *Modern Marketing Service, Inc. v. FTC*, 149 F.2d 970 (7th Cir. 1945).

out reference to the effect of such payments upon competition. Hence, the payment of brokerage fees or the allowance of equivalent price reductions to buyers or, for the benefit of buyers, to brokerage concerns which make direct contact with the seller, dispensing with the employment of a broker on his part, is forbidden; and consumers are denied the resulting saving, except as it may be reflected in a general reduction in the cost of doing business which is passed on to buyers uniformly.¹¹

The other definite exception to the permissible reflection of cost savings in price differentials must be invoked by the Federal Trade Commission to become operative. The Commission "may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce," in which event considerations that otherwise might furnish justification shall not be taken to "permit differentials based on differences in quantities greater than those so fixed and established." Here then is a provision which confers large discretion to deny the benefit of distribution cost savings to dealers whose quantity purchases make them possible and to consumers who obtain goods through such channels. This disadvantage is to be suffered, if necessary, in order to preserve a competitive system.¹²

The doubtful exception to the principle of permitting cost savings and merchandising advantages to be reflected in price differentials or collateral arrangements occurs in connection with situations where services by sellers to buyers and allowances by sellers for services rendered by buyers are excluded as to some buyers for practical reasons. For example, the services of a demonstrator supplied by the seller who operates in customers' stores obviously cannot be made available except where the potential volume of business promises to reimburse the seller for the expense. Yet the statute forbids such services

¹¹Because of these effects, the brokerage provision has been much criticised. Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 GEO. WASH. L. REV. 511 (1940); Austern, *Section 2(c) in CCH ROBINSON-PATMAN ACT SYMPOSIUM* 37 (1946); Oppenheim, *Price and Service Discriminations in CCH ROBINSON-PATMAN ACT SYMPOSIUM* 141, 145-46 (1948). See generally Fulda, *supra* note 5, at 1094-1103. The only apparent ways around it appear to be for certain sellers to engage in direct selling only, thus enabling them without discriminating to accept lower prices than those who employ brokers, or for large purchasers, such as chain stores, to engage in manufacturing or processing for themselves, thus avoiding transactions of purchase altogether. See Fulda, *supra* note 5, at 1103-05.

¹²The "quantity-limit" power is contained in a proviso in § 2(a) of the Act. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946). It will be discussed further below.

to be offered "upon terms not accorded to *all* purchasers on proportionally equal terms."¹³ If one dealer sells a fortieth as much of a product in a ten-hour day as another, must he be offered the services of a demonstrator for 15 minutes as a condition of the other dealer's being allowed them for a day? In the alternative, may a minimum standard be set, which a dealer must meet in order to qualify at all? Or, if seller and dealer share the expense of demonstration, may the seller's share be diminished and the dealer's increased in inverse ratio to the dealer's volume of business? Final answers to these questions are not yet available, except that advertising allowances proportioned to volume of business are lawful and that no scheme which excludes the great preponderance of a seller's customers from benefits available to some is likely to meet with the acceptance of the Federal Trade Commission or the courts.¹⁴ It is entirely possible, in consequence, that sellers may forego furnishing such aids to merchandising, rather than incur the risk of running afoul of the statute.¹⁵ In a recent complaint the Commission has questioned payments by soap manufacturers to retailers for newspaper advertising of their products, apparently on the theory that, since only a few retailers with community-wide business can use newspaper advertising, such payments are inherently discriminatory.¹⁶ Similarly in a recent triple-damage suit for violation of the Robinson-Patman Act, the district court stated that a price allowance based on alleged economies in the delivery of cans from the manufacturer's plant over a runway to the adjoining plant of the customer, a vegetable packer, was necessarily illegal because it involved a service that could not be made available to packers whose plants were not adjoining.¹⁷ In all such situations, if these views hold, the Act requires economic advantage to be foregone in the interest of maintaining competitive equality.¹⁸

¹³49 STAT. 1527 (1936), 15 U.S.C. § 13(e) (1946) (emphasis supplied).

¹⁴Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); Elizabeth Arden, Inc., 39 F.T.C. 283 (1944), *enforcement granted*, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947). See Layton, *Demonstrators on Proportionally Equal Terms* in CCH ROBINSON-PATMAN ACT SYMPOSIUM 38 (1948); Montague, "Proportionally Equal Terms" in *id.* at 51.

¹⁵Violation of the Act may lead to triple-damage suits under § 4 of the Clayton Act, 38 STAT. 731 (1914), 15 U.S.C. § 15 (1946), as well as proceedings by the Federal Trade Commission or the Department of Justice. See Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).

¹⁶Amended and Supplemental Complaints in Lever Brothers Co., 3 CCH TRADE REG. REP. ¶ 14,684 (1951).

¹⁷Russellville Canning Co. v. American Can Co., 87 F. Supp. 484, 498 (W.D. Ark. 1949).

¹⁸Section 2(e) in terms requires the furnishing of services or facilities proportionally to "all purchasers" without explicit reference to competition among purchasers, whereas section 2(d) refers to "customers competing" with each other. The

Subject to stated exceptions, then, the heart of the Robinson-Patman Act lies in the policy of allowing (1) such price discriminations affecting competition, and no others, as can be justified on a basis of cost savings connected with the transactions in which price concessions are given and (2) such sellers' services or such payments and allowances for buyers' services, and only such, as are made proportionally available to all buyers of the same commodities who compete with each other. Each distributor of goods and, therefore, each alternative channel of distribution is to be treated with strict justice, to the end that distributive enterprises may stand or fall on their merits and consumers may have the benefit of the most efficient or, perchance, enjoy the satisfaction of contributing to the most alluring. The Act, in other words, appears to set up a fair field without favors, in which the "orthodox" distributors may contend for business free of the handicap of unwarranted discrimination by sellers in favor of their chain-store rivals, such as the sponsors sought to end.

The Act, however, can operate in accordance with this beguilingly simple principle only if the scales which it provides can be so read as to mark clearly the distinctions between situations in which price or service differentials are permissible and those in which they are not. The scale of costs connected with transactions and the scale of proportional availability of services or of payments and allowances for services will now be considered in sequence.

III. THE ADMINISTRABILITY OF THE COST JUSTIFICATION

The use of the actual costs of a given seller which are connected with various transactions as a measure of the justification for price differentials meets with the possible objections that, in the first place, it may not be costs which determine prices at all even in the long run¹⁹ and, in the second place, it certainly is not costs alone which determine prices in particular transactions, affected as they necessarily are by numerous other market factors. The statute makes a concession to the second objection by providing that "at any hearing on a complaint" of discrimination a *prima facie* case of violation is made by showing the discrimination but that the seller may rebut "the *prima facie* case thus made" by showing that his action was taken "in good faith to

same limitation is, however, regarded as applicable to section 2(e). Kelley, *Should the Law of Section 2 Be Revised?* in CCH ROBINSON-PATMAN ACT SYMPOSIUM 114, 129 (1948). This conclusion may be based on either the legislative intention as evidenced in the legislative history or the use of the word "discriminate," as distinguished from "differentiate," in section 2(e) in common with section 2(a).

¹⁹See Viner, *Cost in 4 ENCYC. SOC. SCI.* 466 (1931), for a discussion of alternative economic theories as to the basis of prices.

meet an equally low price of a competitor, or the services or facilities furnished by a competitor."²⁰ Somewhere in the circle of mutually induced price discriminations one must presumably be found that is attributable to a seller's cost differentials; but competitive considerations, rather than cost factors, may then control the remainder. As to the other and more fundamental objection to the statute's reliance on cost, it may be pointed out that nothing in it ties prices to costs so long as the former are uniform at any given time or do not vary by more than the costs involved.²¹

We come, then, to cost as a measure of price differentials where reliance is placed upon the cost factor as a justification.

It has been remarked that trials of legality under the Robinson-Patman Act are "to proceed by the ordeal of cost accountancy." Upon a "fluctuating mechanism indigenous to business, it is proposed to establish standards for mercantile justice."²² So "fluctuating," indeed, is cost accounting "that no positive realistic definition of the term is possible."²³ But, clearly, cost accounting, like accounting generally, is servant and not master; "it is not a set of fixed rules or unbending principles to be followed without regard to . . . objectives"; and outside of the field of regulated transportation and public utility enterprises, accounting has, of course, followed "the purposes of the management."²⁴ It has been a serious question from the beginning whether "costs, which reflect an organic business," can "be subdued into a weapon of commercial police," so as "to make of discrimination an objective fact."²⁵

This "mechanism" of cost accountancy, which requires adaptation to new purposes under the Robinson-Patman Act, has not been generally available; for "in a large part of the business world nothing deserving the name of cost accounts exists."²⁶ Where cost accounts exist, moreover, their use to justify the actions of a business "before a public tribunal" requires a degree of accuracy greater than that of the rules of thumb with which a business man "may be content . . . when he

²⁰49 STAT. 1526 (1936), 15 U.S.C. § 13(b) (1946). This provision has recently been held to afford a complete defense to the discriminating seller when the requisite showing is made. *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

²¹The Act specifically preserves the legality of "price changes from time to time . . . in response to changing conditions affecting the market for or the marketability of the goods concerned. . . ." 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946).

²²Hamilton, *Cost as a Standard for Price*, 4 LAW & CONTEMP. PROB. 321, 323 (1937).

²³Canning, *Cost Accounting* in 4 ENCYC. SOC. SCI. 475 (1931).

²⁴Bauer, *Accounting* in 1 *id.* at 404, 412 (1930).

²⁵Hamilton, *supra* note 22, at 332.

²⁶CONFERENCE ON PRICE RESEARCH, COST BEHAVIOR AND PRICE POLICY 285 (1943).

himself is the only one to use the information";²⁷ and this greater burden may be a heavy one. Furthermore, the initial establishment of the price differentials that are to be justified under the statute requires cost forecasts; whereas their subsequent vindication calls for verification of the forecasts.²⁸ Accountancy, in consequence, must do double duty, aided, perhaps, by its tendency to have "a precise and final appeal to legislators and the public,"²⁹—an appeal which, however, is not necessarily as potent with the Federal Trade Commission as with less sophisticated agencies.

There is, indeed, a possible interpretation of the cost-justification requirement that would render futile the effort to fulfill it by cost accounting. Complete accuracy as to differences in the cost of supplying commodities would be possible only if separate figures were kept for each customer or lot of goods—a manifestly impossible task. The Act could be taken to require no less. Such an interpretation, however, would be obviously unreasonable. Although attempts at cost justification of customer classification may founder on the rock of unduly broad categories of customers,³⁰ classes of more than a single customer are not per se unacceptable. In at least one case the Federal Trade Commission sustained price differentials to customers according to annual volume of purchases, because of demonstrated differences in the cost of supplying them.³¹ Discounts based on reasonable categories of delivery sizes have been sustained as valid when practically available to the seller's customers as a whole. Here, however, the reason was absence of discrimination, rather than conformity to cost differences.³²

On the whole, then, the door has been open to realization of the suggestion that cost accounting might so spread as a result of the Robinson-Patman Act as to justify calling the statute one "to restore prosperity to, and thenceforward to safeguard the future of, accountants";³³ for it has remained a governing principle in the enforcement of the Act that price differentials based upon classifications of customers, types of orders, or delivery sizes, even if not equally available

²⁷*Id.* at 27–28, quoting Taggart, *The Cost Principle in Minimum Price Regulation*, 8 MICH. BUSINESS STUDIES 151 (1938).

²⁸*Id.* at 22.

²⁹*Id.* at 27.

³⁰Haslett, *The Validity of Quantity Discounts* in CCH ROBINSON-PATMAN ACT SYMPOSIUM 26, 35 (1948).

³¹Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 381–82, 393–94 (1948), *order set aside*, CCH TRADE REG. REP. ¶ 62,881 (7th Cir. 1951). See also Freer, *Accounting Problems under the Robinson-Patman Act*, 65 J. ACCOUNTANCY 480 (1938).

³²Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937); American Optical Co., 28 F.T.C. 169, 183 (1939).

³³Freer, *supra* note 31, at 481.

in a practical sense to all competing customers, will be lawful if adequately supported by cost figures. By all reports, however, the anticipated development of cost accounting and use of the results in proceedings under the Act have not taken place; "management, in general, has not yet devoted the refined attention to distribution costs required by the act."³⁴ Although the reference is to distribution costs, rather than costs as a whole, the same statement might be made with regard to production costs kept in such a way as to furnish a basis for price differences in sales of a given product. The reason hardly lies in a general adoption by sellers of a policy of price uniformity,³⁵ which would dispense with the legal need for keeping track of costs. Whether the reason resides in factors inherent in the production and marketing of goods or will yield to the spur of continued enforcement of the Robinson-Patman Act is one of the questions calling for attention.

The Act provides that its prohibition of price discrimination shall not "prevent differentials which make only due allowance for differences in the cost of manufacture," as well as of sale or delivery, "resulting from the differing methods or quantities in which" commodities are "sold or delivered."³⁶ Therefore, production cost economies connected with a given order or contract, which occur because the order is given in advance and is large enough to permit the purchase of the required material in greater-than-normal quantity, to enable operations to be planned more efficiently, or to make cheaper bank credit for the purchase of the material available on the strength of it, may be reflected in a lower price to the purchaser than is accorded on small-lot business, provided the savings can be demonstrated and properly allocated to the particular purchase.³⁷ It is this allocation which pre-

³⁴Haslett, *Price Discriminations and Their Justifications under the Robinson-Patman Act of 1936*, 46 MICH. L. REV. 450, 472 (1948). See also Heckert, *Coverage and Cost Provisions of the Robinson-Patman Act*, 31 NAT. ASS'N COST ACCOUNTANTS BULL. 269, 281 (1949); FTC, *Case Studies in Distribution Cost Accounting*, H.R. Doc. No. 287, 77th Cong., 1st Sess. (1941), at 21-22: "The Commission's field survey, made in pursuance of this inquiry, showed that out of 137 concerns of many types and sizes, selected because of a probability that they had developed a procedure of distribution cost accounting, only 34 had made any start in this direction and a much smaller number had made any substantial progress. A considerable number of these companies which have done little in this direction are large and nationally important firms." The appendices to the Commission's report contain specific examples of accounting methods that might accomplish the necessary refinement of distribution cost accounting, even to the point of allocating costs to specific customers and orders (*cf.* text following note 70 *infra*). See especially pp. 126-30, 136-80, 189-95.

³⁵*Cf.* EDWARDS, *MAINTAINING COMPETITION* 162-63, 167-68 (1949); Fulda, *supra* note 5, at 1082-1109.

³⁶49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946).

³⁷See *United States v. Sugar Institute, Inc.*, 15 F. Supp. 817, 867-70 (S.D.N.Y. 1934), *aff'd*, 297 U.S. 553 (1936), for an instance of the practice which received judicial approval as against a trade-association attempt to curb it. *Cf.* Fly, *The Sugar Institute Decisions and the Anti-Trust Laws*: 2, 46 YALE L.J. 228, 242-48 (1936).

sents the difficulty, since typically goods are manufactured for stock or to fill an accumulation of orders and no proper basis exists for allocating more than a proportionate share of the economies of volume to any of the components which create that volume.³⁸ The problem has been especially prominent in connection with the allocation of "fixed," or "overhead," costs (as distinguished from the common costs of material and of operation just mentioned) among the units of production.

From the standpoint of the producing enterprise, it may be natural and proper to refrain from charging as cost to additional business, which it may be possible to procure at lowered prices, any part or some fractional part of the prorated overhead cost³⁹ otherwise allocable to such business, if that cost has been met or can be met from other business already in hand or assured. To refrain from entering such a charge will, indeed, cause the records, as compared to the state of the books if the additional business were not accepted, to reflect accurately the results of accepting it. If some part of the prorated overhead can be charged to the additional business and be reflected in the price charged, the enterprise will gain over the status quo; and if the gain can be reflected in lowered prices to other customers, all will benefit despite a price differential in favor of the new business. Cost accounting which is so conducted as to bring out these factors will meet the needs of the enterprise.

It by no means follows, however, that cost figures so arrived at should be accepted in applying the Robinson-Patman Act; for the standpoint from which the cost justification for price discrimination must be judged is the over-all legislative, or public policy, standpoint and not that of the producing enterprise. Here other considerations come into play. "If the new business represents a true addition to the social dividend, the interest of the concern making the discrimination corresponds with that of society. If the new business is merely taken from competitors (or shifted from the consumption of different goods) whose costs of production behave in the same way, then there is no social gain, but merely a loss to the competitors which corresponds to the private gain made by the business originating the discrimination."⁴⁰

³⁸The allocation of "joint" and "common" costs to different products manufactured simultaneously presents an analogous problem. Only arbitrary solutions to it have been evolved. CONFERENCE ON PRICE RESEARCH, *op. cit. supra* note 26, at 172-86.

³⁹For this purpose, "overhead" includes interest on borrowed capital, property taxes, maintenance and managerial expense, depreciation, and any other costs that continue throughout the accounting period without reference to the volume of business.

⁴⁰J. M. Clark, *Overhead Costs* in 11 ENCYC. SOC. SCI. 511, 512 (1933).

This loss to competitors, if not subsequently overcome by reprisals on their part which regain business and nullify the gain of the original discriminator, leaves the latter correspondingly closer to monopoly and the former weakened financially or compelled to charge their customers higher prices on a diminishing volume of business. Permanent social gain can result only if continued growth of the discriminator does not carry its size beyond that of maximum efficiency and if it continues to pass on to its customers the resulting economies.

In relation to public utilities, where monopoly pricing is carried on under public regulation, preferential rates to off-peak traffic or load are a familiar feature of rate structures, which is usually justified.⁴¹ The shoppers or weekly-pass holders who ride a local transportation system at reduced rates mainly during the non-rush hours, and the industrial users of electricity at special rates during the daylight period, assist in maintaining necessary utility enterprises without carrying their full proportionate share of the cost burden, and their use of the facilities represents social gain in so far as it does not weaken other essential elements of the economy.⁴² The same reasoning cannot be transferred to the competitive pricing of commodities.

The intention to forbid unequal allocation of overhead costs to different items of business was clearly expressed in connection with the passage of the Robinson-Patman Act. In the words of the House committee report, Section 2(a) "precludes differentials based on imputation of overhead to particular customers, or exemption of others from it, where such overhead represents facilities or activities inseparable from the seller's business as a whole and not attributable to the business of particular customers concerned in the discrimination."⁴³ There appear to be no instances of attempted use of unequal allocation of manufacturing overhead in proceedings arising under the Act. The matter has, however, been discussed in the literature, along with manufacturing costs generally.⁴⁴

⁴¹TROXEL, *ECONOMICS OF PUBLIC UTILITIES* 572-78 (1947). The author is critical of the lengths to which price differentials, amounting often to unjustified discrimination, have been carried in the utility industry. See also BARNES, *THE ECONOMICS OF PUBLIC UTILITY REGULATION* 331-32 (1942).

⁴²The use of natural gas as an industrial fuel, with consequent enhancement of the depletion of resources and adverse effects upon the coal industry, for example, raises serious questions.

⁴³H.R. REP. No. 2287, 74th Cong., 2d Sess. 9-10 (1936).

⁴⁴See Thorp, *Possible Effects of the Robinson-Patman Act on Business Practices*, Dun & Brad. Monthly Rev., July, 1936, p. 2; Daughters, *Lawful Discrimination under the Robinson-Patman Act*, Dun & Brad. Monthly Rev., Oct., 1936, p. 7; Note, 31 ILL. L. REV. 907, 920 (1937). The Federal Trade Commission had rejected a contention that a large order might properly be charged with less overhead per unit than small orders in Goodyear Tire & Rubber Co., 22 F.T.C. 232, 289 (1936), which arose under the original Clayton Act.

Similar problems arise in connection with distribution and sales expenses. The treatment of these outlays is affected, in addition, by the absence of a background of cost-accounting experience such as exists with respect to manufacturing, which has led respondents in proceedings before the Federal Trade Commission under the Robinson-Patman Act in several outstanding instances to rely upon ad hoc surveys in attempting to justify price differences on a cost basis.⁴⁵ A long-established cost system would probably have precluded such an obvious flaw in the allocation of general advertising expense as marred the attempted justification of a price differential in favor of certain large gasoline jobbers in the Detroit area, which the Standard Oil Company of Indiana offered to the Commission. Although these dealers and their retail customers sold the Company's branded gasoline, none of the cost of advertising that brand and the Company's business generally, except the cost of service station signs and displays, was charged to the cost of doing business with these dealers, but all was assessed against tank-wagon sales to service stations.⁴⁶

As the Act has worked out, quantity discounts, based on the size of the individual delivery, are more readily sustainable⁴⁷ than volume discounts, based on quantities purchased over periods of time.⁴⁸ The former have been judged largely on the basis of their practical availability to all customers when the size of delivery required to earn them was not excessive.⁴⁹ Where they are not justified on this basis, actual cost savings at least equal to the discounts must be shown,⁵⁰ as

⁴⁵As to the slow development of distribution cost accounting see the references in note 34 *supra*, together with George, *The Robinson-Patman Act Begins to Acquire Meaning*, Dun's Rev., Mar., 1940, p. 26; and Longman, *Distribution Costs—Present Methods of Cost Analysis*, 70 J. ACCOUNTANCY 431 (1940).

⁴⁶Standard Oil Co., 41 F.T.C. 263, 278, 281 (1945), *rev'd*, 340 U.S. 231 (1951).

⁴⁷Corn Products Refining Co. v. FTC, 144 F.2d 211, 220-21 (7th Cir. 1944), *aff'd as to other points*, 324 U.S. 726 (1945).

⁴⁸American Optical Co., 28 F.T.C. 169 (1939), illustrates both points in a single proceeding. See also the Commission's opinions in Master Lock Co., 27 F.T.C. 982, 991-92 (1938); H. C. Brill Co., 26 F.T.C. 666 (1938). As to volume discounts see also the cases cited in note 51 *infra*.

⁴⁹See note 32 *supra*. In the *Kraft-Phenix* case the Commission also found that the threat to competition, requisite to illegality, was lacking. In *Sherwin-Williams Co.*, 36 F.T.C. 25 (1943), the Commission seems to have accepted the validity of volume as well as of quantity discounts, where the annual purchases required to earn them were small in amount. The Commission found against the respondents because announced discount schedules were not actually followed in important instances.

⁵⁰American Maize-Products Co., 32 F.T.C. 901 (1941); *cf.* Corn Products Refining Co., 34 F.T.C. 850, 862 (1942), *modified*, 144 F.2d 211, 220-21 (7th Cir. 1944); Morton Salt Co., 39 F.T.C. 35 (1944), *modified*, 40 F.T.C. 388 (1945), *order set aside*, 162 F.2d 949 (7th Cir. 1947), *rev'd*, 334 U.S. 37 (1948).

is the case also, of course, with volume discounts.⁵¹ Price reductions in consideration of large orders placed in advance form a third category of price differential where, again, cost differences are more readily possible.⁵²

Justification of price differentials on the basis of costs has been seriously attempted in relatively few cases. Such attempts were successful before the Federal Trade Commission in *Bird & Son, Inc.*⁵³ and partially successful—i.e., as to certain volume-discount categories—in *Minneapolis-Honeywell Regulator Co.*⁵⁴ Those in *Standard Brands, Inc.*,⁵⁵ *Morton Salt Co.*,⁵⁶ and *Standard Oil Co.*⁵⁷ were unsuccessful. In *Goodyear Tire & Rubber Co.*, which arose under the Clayton Act before its amendment by the Robinson-Patman Act and in which the respondent attempted an elaborate cost justification, the Commission applied the same principles as those subsequently incorporated into the amending statute and found itself unable to accept the justification.⁵⁸ The *Standard Brands*, *Standard Oil*, and *Goodyear* cases involved the most elaborate attempts so far made to establish cost justifications before the Commission. An attempt by the American Can Company, which it used in defense of triple-damage suits,⁵⁹ covered a 4¾-year period; but it related to such indefensibly wide classifications

⁵¹*Morton Salt Co.*, *supra* note 50; *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir. 1951); *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484, 494-97 (W.D. Ark. 1949); *H. C. Brill Co.*, 26 F.T.C. 666 (1938).

⁵²*United States v. Sugar Institute, Inc.*, 15 F. Supp. 817 (S.D.N.Y. 1934), *aff'd*, 297 U.S. 558 (1936).

⁵³25 F.T.C. 548 (1937).

⁵⁴44 F.T.C. 351 (1948). The Commission's order as to the discrimination which it found illegal was set aside on the ground that the requisite threat to competition was not shown in *Minneapolis-Honeywell Regulator Co. v. FTC*, CCH TRADE REG. REP. ¶ 62, 881 (7th Cir. 1951).

⁵⁵30 F.T.C. 1117 (1940).

⁵⁶39 F.T.C. 35 (1944), *modified*, 40 F.T.C. 388 (1945), *order set aside*, 162 F.2d 949 (7th Cir. 1947), *rev'd*, 334 U.S. 37 (1948).

⁵⁷41 F.T.C. 263 (1945), *rev'd*, 340 U.S. 231 (1951).

⁵⁸22 F.T.C. 232 (1936). Prior to its amendment, the statute contained a proviso permitting "discriminations in price . . . on account of differences in the . . . quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation. . . ." (emphasis supplied), instead of, as now, "due allowance for difference in . . . cost . . . resulting." The order in the *Goodyear* case was set aside in *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir.), *cert. denied*, 308 U.S. 557 (1939), on the ground that the amount of the differences in price that might be based on differences in quantity was not limited by cost factors. By the time the decision of the court was rendered, the Robinson-Patman Act had been passed. The Commission's decision, rather than the court's therefore relates to the statute as it has subsequently stood.

⁵⁹*American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir. 1951).

of customers as to be of no avail regardless of other considerations.⁶⁰

Standard Brands' elaborate attempt to establish a cost justification for a schedule of volume discounts on monthly sales of its baker's yeast broke down largely because several of its fundamental calculations rested upon the assumption that the cost of distributing this product amounted to 23% of gross sales and that other percentages similarly measured the distribution costs of its various other products. Although this assumption rested upon long experience and had been used in the Company's previous bookkeeping, it was not supported by specific data or analysis, and the Commission was unable to accept it.⁶¹

The Federal Trade Commission's report of the *Morton Salt* decision contains only a brief reference to the Company's attempted cost justification, which its trial examiner characterized as "being based upon estimates, hypotheses, and mere guesses" but which the Commission fully considered.⁶² In the *Standard Oil Co.* case two separate types of cost justification were offered in support of the Company's discrimination in favor of certain gasoline jobbers in the Detroit area and an earlier, smaller price discrimination in favor of one of them (which actually was a chain retailer) before its acquisition of bulk storage tanks which qualified it for the larger price reduction. One of these involved a comparison between the cost of handling the business of other jobbers in Kansas and Oklahoma and the cost of handling non-jobber, "tank wagon" business in the entire Detroit sales "field," embracing much more than the city and its immediate suburbs to which the controversy related. The failure of the facts adduced to fit those in dispute was obvious.⁶³ The other type of justification involved an allocation of expenses in Detroit to the classes of customers involved. Aside from the mis-allocation of advertising expense previously referred to,⁶⁴ this attempt failed because in relation to the jobbers it again used the entire Detroit "field" for comparison; and in allocating expenses to the "tank wagon" retailers it failed to take account of pertinent

⁶⁰Under the classification approximately 99% of the American Can Company's customers received no discount. Discounts began with annual purchases of \$500,000, with 1% allowed on purchases totaling up to \$1,000,000. The higher brackets had spreads of \$2,000,000 until \$7,000,000 was reached. The discount from that point up was 5%. In its cost study, however, the Company lumped all its customers into three groups: those with annual purchases of less than \$500,000, those with purchases of \$7,000,000 or more, and those in between.

⁶¹The cost accounting involved in the case and the Commission's decision are excellently summarized and commented upon in Taggart, *The Standard Brands Case*, 21 NAT. ASS'N COST ACCOUNTANTS BULL. 195 (1939), and Comment, *Cost Accounting Defenses under the Robinson-Patman Act*, 35 ILL. L. REV. 60 (1940).

⁶²40 F.T.C. at 397.

⁶³41 F.T.C. at 278-79.

⁶⁴See text at note 46 *supra*.

differences in the manner of doing business with various ones of them and charged this group with cost items that should have been spread over the entire business.⁶⁵

The *Goodyear* case involved a series of long-term cost-plus arrangements for the Company's manufacture of Sears, Roebuck & Co.'s private brand of tires, which resulted in prices totalling 26% less than those Goodyear would have charged its trade distributors for the same products. Although the Commission recognized the validity of price differentials based on cost and of excluding from the cost of fulfilling these contracts certain over-all expenses such as advertising which related to the Company's own brands and of charging these items wholly to the Company's regular business,⁶⁶ it declined to approve the same treatment of other items, such as losses incurred in operating Company-owned retail stores,⁶⁷ or to recognize the "speculative, intangible, and remote" value of an altered distribution of risk, which in any event did not show up in the profit-and-loss statement in nearly the amount claimed.⁶⁸ The difficulty here related to issues of policy and not primarily to questions of accounting methods.⁶⁹ It should be noted, however, that, along with reduced costs under an arrangement which did not require the use of the seller's large merchandising organization, a smaller profit, foregoing the normal profit in the operation of that organization, would be in order—a factor which the Federal Trade Commission appears not to have regarded.

The failure of agreement in regard to these major attempts to establish cost justifications for price differentials, such as could have avoided the pursuit of adversary proceedings to decisions which rejected one point of view in favor of another, might seem to indicate either that business concerns have been unwilling to develop adequate methods of cost accounting or that cost accounting is inherently an inadequate tool for settling such problems. Before such conclusions are reached, however, it should be recognized that questions of policy such as those in the *Goodyear* case cannot be resolved by accounting any more than by other methods of analysis—accounting performs its function if it reveals the contours of such issues and makes possible clear decisions upon them. Only in the *Standard Brands* and *Standard Oil* cases can it be said that the particular cost-accounting methods, as such,

⁶⁵41 F.T.C. at 276-77, 280-81.

⁶⁶22 F.T.C. at 282-85, 328-29.

⁶⁷*Id.* at 284.

⁶⁸*Id.* at 287.

⁶⁹The case is well discussed in George, *Federal Trade Commission Decision in the Goodyear Case*, *Dun & Brad. Monthly Rev.*, Apr., 1936, p. 12, May, 1936, p. 10, and June, 1936, p. 4.

failed; and of course it cannot be said that better methods might not have been possible and have succeeded. Accounting methods, in fact, would receive an adequate test only if they were used to establish price differentials in the first instance, instead of being invoked merely after the fact to justify discriminations that were set up for other reasons. Whether competitive business could function in any such "scientific" fashion is, of course, another matter; but even a solid array of unsuccessful instances of attempts to establish cost justifications in legal proceedings⁷⁰ would fall short of proving that business is not being conducted in just such a manner in noteworthy instances that evoke no official challenge or triple-damage suit. The facts as to such instances will not even emerge in the literature—including that which describes business practice—unless it relates accounting methods to the establishment of price differences on a single product. Such self-revelation on the part of competitive business is rare.

IV. EXACTNESS IN RELATION TO SERVICES AND ALLOWANCES

The decisions with regard to services to buyers and payments or allowances for services by buyers, under paragraphs 2(d) and (e) of the Robinson-Patman Act, have continued to require that the availability of benefits not be restricted to only a few customers and that, when extended, the benefits be "proportionally equal." Whether minimum conditions for the availability of benefits may be prescribed so long as they are not too restrictive, and what may be the measure of proportionality, are questions not yet authoritatively answered,⁷¹ since no cases to test the limits have arisen. Typically, the Commission's orders have been directed against sellers who have made payments to selected customers for services such as advertising, counter display, maintenance of stocks, or other forms of promotion which were not precisely defined or measured, without offering such payments to other customers who were equally equipped to earn them or, in some instances, had actually performed the same services without recompense.⁷² The purpose of the Act and subsequent signs point to the

⁷⁰The array is not solid, of course. Cf. *Bird & Son, Inc.*, 25 F.T.C. 548 (1937); *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948), *order set aside*, CCH TRADE REG. REP. ¶ 62,881 (7th Cir. 1951).

⁷¹See text at note 14 *supra*.

⁷²*Kay Windsor Frocks, Inc.*, 3 CCH TRADE REG. REP. ¶ 14,741 (FTC 1951); *Bulova Watch Co.*, 3 CCH TRADE REG. REP. ¶ 14,716 (FTC 1951); *Curtiss Candy Co.*, 44 F.T.C. 237 (1947); *Holzbeierlein & Sons, Inc.*, 39 F.T.C. 82 (1944); General

validity of the formulation of the minimum requirement of the Act in this regard, which has been stated on the basis of the Commission's dictum in the *Elizabeth Arden* case,⁷³ whereby the service or payment rendered by a seller must be actually available to "competing dealers" and these services or payments must be apportioned either equally or according to some reasonable standard of their relative value in light of the nature of the services involved or the volume and perhaps the character of the buyer's business in the purchase and sale of the seller's product.⁷⁴

V. THE NET IMPACT OF THE ACT'S STANDARDS

The Federal Trade Commission in administering the Robinson-Patman Act as to the possible justification of price and service differentials has applied its terms strictly so as to require these justifications to operate mathematically or mechanically, with very little room for the intrusion of qualitative considerations. No clearly adequate techniques of cost accounting, by which to measure price differentials based on differences in cost, and no entirely precise or complete test of the validity of service differentials, have emerged. The Commission's Trade Practice Conference Rules, by which about 200 industries are now governed, although they frequently contain prohibitions of price and service discriminations, afford no greater guidance, for they simply repeat with monotonous regularity the language of the statute.⁷⁵ The Commission's Digest of Cease and Desist Orders also gives no clues, since the pertinent portions simply cite the Commission's decisions under cryptic headings.⁷⁶

In applying the statute strictly the Commission has proceeded in accordance with its purpose.⁷⁷ By excluding inexact measures of justifi-

Baking Co., 38 F.T.C. 307 (1944); Binney and Smith Co., 32 F.T.C. 315 (1940). See also *American Co-operative Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907 (7th Cir. 1946).

⁷³39 F.T.C. 288, 302 (1944).

⁷⁴Dunn, *Section 2(d) and (e) in CCH ROBINSON-PATMAN ACT SYMPOSIUM* 55, 72 (1946). See also the more detailed suggestions in OPPENHEIM, *PRICE AND SERVICE DISCRIMINATIONS UNDER THE ROBINSON-PATMAN ACT* 51-52 (1949), summarized from FELDMAN AND ZORN, *ROBINSON-PATMAN ACT: ADVERTISING AND PROMOTIONAL ALLOWANCES* (1948).

⁷⁵The Rules are set forth in 16 CODE FED. REGS. § 17.1 *et seq.* (1949).

⁷⁶16 CODE FED. REGS. § 3.685 *et seq.* (1949).

⁷⁷The legislative history of the Robinson-Patman Act has been heavily drawn upon in discussions of the various provisions of the Act, such as those in the CCH Robinson-Patman Act Symposia (1946-1949), and in AUSTIN, *PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT* (1950). Portions of it are reproduced in OPPENHEIM, *UNFAIR PRACTICE—CASES, COMMENTS AND MATERIALS* 1003-11 (1950), and substantial portions are set forth in 1 CCH TRADE REG. REP. ¶ 2211-17 (1948).

cation for price and service differentials it has avoided the obstacles to enforcement, to which a contrary interpretation would give rise. Its method, coupled with the burden of proof resting upon respondents,⁷⁸ has resulted in very few decisions on the merits in favor of respondents, although a large number of dismissals "without prejudice" have been entered for reasons not definitely stated but which may include lack of substance to the charges in the light of some degree of consideration of the merits.⁷⁹

One possible escape from some of the rigor of the Commission's interpretation of the Act has lain in the continued recognition which has been given to the legality of a seller's classifying his customers according to their business "functions," such as manufacturing, wholesaling, retailing, etc., and setting different prices for the various classes. Although this practice may be carried on under circumstances which render price cuts to a class of purchasers an illegal threat to the competition of the seller's competitors with him,⁸⁰ such price differentials are not ordinarily illegal on the ground that competition among the buyers of different classes who receive different prices is threatened, since the members of the various classes do not compete with each other. Hence it is not necessary to justify the differentials on a cost basis.⁸¹ If a purchaser carries on different functions with relation to different units of the commodities purchased, it is only necessary to apply the appropriate price to the units actually handled in each way,

⁷⁸Paragraph 2(b) of the Act provides that "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination. . . ." 49 STAT. 1526 (1936), 15 U.S.C. § 13(b) (1946). As to the further provision of this same paragraph see note 20 and accompanying text *supra*.

⁷⁹House Select Committee on Small Business, Preliminary Report on Antitrust Law Enforcement, H.R. REP. NO. 3236, 81st Cong., 2d Sess. 37 (1951). The dismissals are reported in the volumes of FTC decisions. Some dismissals are caused by abandonment of the practices charged. That in Bissell Carpet Sweeper Co., 40 F.T.C. 738 (1945), however, came after "further consideration of . . . respondent's justification . . . on the basis of different service costs. . . ."

⁸⁰Such price cuts, by taking business away unjustifiably from the competitors, would conflict with the purpose of the original Clayton Act. It is on this ground alone that discrimination in favor of manufacturers as to a commodity which they incorporate into their own product, without discrimination among them, may become illegal. See *S. S. Kresge Co. v. Champion Spark Plug Co.*, 3 F.2d 415 (6th Cir. 1925); *General Motors Corp.*, 3 CCH TRADE REG. REP. ¶ 14,098 (FTC 1948) (still pending); *Champion Spark Plug Co.*, 3 CCH TRADE REG. REP. ¶ 2212.5601 (FTC 1948) (still pending).

⁸¹See generally Schneiderman, "*The Tyranny of Labels*"—*A Study of Functional Discounts under the Robinson-Patman Act*, 60 HARV. L. REV. 571 (1947); Van Cise, *Functional Prices in CCH ROBINSON-PATMAN ACT SYMPOSIUM* 89 (1947).

charging the wholesaler's price on goods resold at wholesale, the retailer's price on goods resold at retail, etc.⁸² It has been assumed in accord with the legislative intent that alleged discrimination in relation to a purchaser like a chain store, if it carried out both wholesaling and retailing functions as to the same goods, would be judged in relation to sales to those other purchasers who sold, not bought, goods in the same manner as the chain, thus requiring a cost justification for any price disadvantage to other retailers.⁸³ By using the opportunity for price discrimination among "functional" classes of customers, a seller may favor one channel of distribution for his product over another. Two qualifications to this statement must be made, however: (1) the seller may not maintain relations with retailers who buy from his wholesale customers so as to make them in effect his own customers, and at the same time sponsor price differentials between them and retailers who buy directly from the seller;⁸⁴ and (2) according to the Federal Trade Commission's view as modified by the court of appeals in the *Standard Oil* case, the seller may not give his wholesalers a price advantage with knowledge that they pass it on in part to their retailer customers and that these retailers undersell competing retailers who buy directly from the principal seller at higher prices.⁸⁵ If this view should be accepted, a producer would virtually be obliged to maintain equality among the prices charged for his product to distributors at each marketing level, no matter by what channel his product reached each level, if he sold through different channels and maintained functional price differences.⁸⁶ He might, however, sell at uniform prices to all classes of

⁸²The *Inoculator* cases, 26 F.T.C. 296, 303, 312, 320 (1938), embody this view clearly. See also *American Oil Co.*, 29 F.T.C. 857 (1939).

⁸³*Schniderman supra* note 81, at 586-88.

⁸⁴See *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537, 546 (1937).

⁸⁵173 F.2d 210 (7th Cir. 1949). The decision on this point rests on the provision of the Robinson-Patman Act that price discrimination is unlawful when not specifically justified, not only where its effect "may be substantially to lessen competition," but also where its effect may be "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946). The decision was reversed in 340 U.S. 231 (1951). The case had three facets: (1) the Company's attempted cost defense, which the Commission rejected and the courts did not review (see text at note 63 *supra*); (2) the question here discussed, which was not reached in the Supreme Court; and (3) the question decided in the Supreme Court (see note 20 *supra*), whether it is a complete defense against a charge of otherwise unjustified discrimination that the seller acted in good faith to meet "an equally low price of a competitor." Since the Court held that it was such a defense and the Commission had not considered it, the case was remanded for the Commission to consider this question on the facts.

⁸⁶This obligation would rest upon him only in so far as he knew or should have known that price cutting was going on. The situations would be few, however, in which price cutting that was more than sporadic would be unknown to him,

purchasers,⁸⁷ or he might choose to sell through one channel of distribution only, thus eliminating others altogether.⁸⁸

The possibility has been envisaged that the Federal Trade Commission might be led by the logic of its reasoning to pass on the size of functional differentials.⁸⁹ Recently it seems to have been feared in trade channels, as a result of developments in the Commission's handling of the spark plug cases,⁹⁰ that it might do away with functional discounts in at least some situations. As a result the Commission felt impelled to give assurance in a press release containing a letter sent by the director of its Bureau of Antimonopoly that it was not opposed to functional discounts as such. It appears that, rather, the particular functional classification used by the spark plug manufacturers may be at fault.⁹¹

Closely related to dissatisfaction with the Commission's handling of the functional discount problem is a recently intensified unhappiness over its judgments with regard to that injury to competition which is necessary to render price discrimination among purchasers in interstate commerce illegal. It is said, for example, that the Commission has confused injury to competitors with injury to competition and has overlooked the greater evil because of preoccupation with the lesser.⁹² In the *Standard Oil* situation, for example, we are told that it would be far better to allow price competition among alternative channels of distribution (the Company itself as a wholesaler on the one hand and the jobbers on the other hand), even though some retailers might be temporarily injured, than to choke off such competition by a cease-and-desist order for the purpose of protecting these retailers. More pertinent here, however, is the question of what foundation must exist in a record for a Commission finding that competition (whether in

since complaints would promptly be made. If the Robinson-Patman Act is so interpreted, it of course comes in conflict with the Sherman and Federal Trade Commission Acts except, perhaps, in situations to which the Miller-Tydings Amendment applies (see *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 [1951]), since both resale price-maintenance agreements between seller and buyer and thoroughgoing efforts by the former to control the resale prices of buyers are illegal under these acts. *Schwegmann Bros. v. Calvert Distillers Corp.*, *supra*; *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

⁸⁷*Bird & Son, Inc.*, 25 F.T.C. 548 (1937).

⁸⁸The right to select one's customers "in bona fide transactions and not in restraint of trade" is expressly preserved by a proviso in paragraph 2(a) of the Robinson-Patman Act. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946).

⁸⁹*Van Cise*, *supra* note 81, at 97.

⁹⁰See note 80 *supra*.

⁹¹See the FTC printed summary of press releases for the week ended Dec. 2, 1950.

⁹²*Cf. STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE* 374 (1951); EDWARDS, *MAINTAINING COMPETITION* 167-69 (1949).

some general sense or in the sense of continued business health on the part of one or more competitors) actually is threatened with injury by a given price discrimination. In the early *Kraft-Phenix* case the Commission concluded that price differentials which were reasonably available to all customers, even though not all took advantage of them, did not have the effect on competition that would render them illegal. It further pointed out that so many other factors than a few cents' variation in the cost of packages of cheese affected the selling prices and business success of retailers that it would be unrealistic, without specific evidence of injury, to attribute substantial effect upon competition to such variations.⁹³ At the time of that decision the Commission assumed the burden of establishing injury to competition as part of the *prima facie* case of "discrimination" which it had to make in order to shift the burden of establishing a defense to the respondent. Later it took the view that it was enough to establish a *prima facie* case for the Commission to show the existence of a price differential by a seller in interstate commerce, together with the existence of competition.⁹⁴ By the same token the conclusion that there was injury to competition would follow at the end of a proceeding unless an adequate showing was made that there was not. In the recent *Morton Salt*⁹⁵ and *Minneapolis-Honeywell*⁹⁶ cases, accordingly, injury to competition was found even though the facts were in many respects analogous to those in the *Kraft-Phenix* case,⁹⁷ upon the theory that a financial advantage accruing to one or more competitors over others in the same market constitutes a threat to the competitive strength of the latter. The Court of Appeals for the Seventh Circuit, which overruled the Commission in the *Morton Salt* case,⁹⁸ had its action in turn reversed by the Supreme Court in a decision which concluded that, "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a

⁹³25 F.T.C. 537, 545 (1937).

⁹⁴The evolution of the Commission's views is traced in Austern, *Required Competitive Injury and Permitted Meeting of Competition* in CCH ROBINSON-PATMAN ACT SYMPOSIUM 63 (1947).

⁹⁵*Morton Salt Co.*, 39 F.T.C. 35 (1944), *modified*, 40 F.T.C. 388 (1945).

⁹⁶*Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948), *order set aside*, CCH TRADE REG. REP. ¶ 62,881 (7th Cir. 1951).

⁹⁷In *Morton Salt*, the carload discount, which was the one in controversy in this connection, was, like the favorable prices in *Kraft-Phenix*, made quite generally available—in this instance, by encouraging pooling arrangements among purchasers; and the item to which it related was one of many on the shelves of retail purchasers. In *Minneapolis-Honeywell*, as in *Kraft-Phenix*, but to a more striking extent, there was an absence of correlation between the price differentials on respondent's heat-control devices and the price differences on the furnaces made or assembled by various purchasers, into which the devices went.

⁹⁸162 F.2d 949 (7th Cir. 1947).

'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers," and that the evidence and the Commission's finding of actual injury to competition went beyond what was necessary.⁹⁹ In the later *Minneapolis-Honeywell* case¹⁰⁰ the Seventh Circuit, encouraged by the intervening reversal of the Commission in the *Standard Oil* decision and by the enlarged scope of review of administrative findings which it deemed the *Universal Camera* decision¹⁰¹ to have opened up, again concluded that the Commission's finding of injury to competition was inadequately supported.

If the principles of the *Morton Salt* decision continue to prevail, the strict administration of the provisions of the Robinson-Patman Act relating to the justification of price and service discrimination will be reinforced by virtual closing of the door to a showing of absence of resulting injury to competition. Whether the defense of good-faith meeting of competition will be more readily available in a practical sense remains to be seen.¹⁰² Unless a fairly ready loophole is provided by this means, the statute will be more clearly enforceable in cease-and-desist proceedings than it has ever been before. In so far as the statutory purpose can actually be achieved by means of such proceedings, the Commission and the courts will have forged an effective policy-executing weapon, fittingly taking their cue as to policy from the statute.

VI. FUTURE PROTECTION TO THE PUBLIC INTEREST

Evidence is lacking that the Robinson-Patman Act has had the effect on any large scale of inducing the adoption by business of refined cost-accounting techniques or equitably-devised plans for service to

⁹⁹334 U.S. 37, 50 (1948).

¹⁰⁰*Minneapolis-Honeywell Regulator Co. v. FTC*, CCH TRADE REG. REP. ¶ 62,881 (7th Cir. 1951).

¹⁰¹*Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). In the *Minneapolis-Honeywell*, as in the *Universal Camera*, case the administrative agency substituted its own finding for a contrary finding of its trial examiner. To do so where it appears from the record that the examiner's finding is supported by a preponderance of the evidence is, said the Seventh Circuit, "arbitrary."

¹⁰²A pending legislative proposal, which would cement the Supreme Court's holding in the *Standard Oil* case into statute, would add that "a seller shall not be deemed to have acted in good faith if he knew or should have known that the lower price or more extensive services or facilities which he met were in fact unlawful." S. 719, 82d Cong., 1st Sess. (1951). This bill was passed by the Senate on August 2, 1951. 97 Cong. Rec. 9660-61 (Aug. 2, 1951). It also deals with the basing-point, or delivered-price, problem. Even with such legislation, the Commission must continue to judge in the first instance whether the defense has been established.

customers or allowances to customers, such as would achieve the goal of fair competitive opportunity for all forms of distributive enterprises and of maximum efficiency in service to consumers. The Federal Trade Commission has found the statute to afford effective bases for issuing orders to strike down price and service discriminations. The indications are, however, that business has either gone its way, giving relatively little attention to the statute and its interpretation, which have not yielded clear guides for precise adaptation to legal requirements, or has abandoned many, perhaps justifiable, price differentials and aids to distribution rather than run the risk of colliding with the law.

The dissatisfactions that gave rise to the Act continue to be expressed, with resulting proposals for supplementary legislation and for strengthened administration.¹⁰³ The demand for rigorous measures against discrimination is far less powerful than during the Great Depression; but its continuance is some indication, along with the continued need for enforcement proceedings, that the Act has been less than fully effective. Quite clearly, competitive business, aside from situations in which an organized exchange or a fairly-conducted competitive bidding system sets the framework, proceeds by means of ceaseless searching for opportunity and for advantage, followed by arrangements which secure the advantage in specific situations for greater or less periods of time. Prices are determined on a basis of custom modified by "hunches" or by intuitive judgments which take account of a host of imponderables.¹⁰⁴ To endeavor to impose "scien-

¹⁰³The report of the House Select Committee on Small Business, on Monopolistic and Unfair Trade Practices, H.R. REP. No. 2465, 80th Cong., 2d Sess. (1948), contains both a summary of the testimony before a subcommittee at earlier hearings and certain of the Committee's own comments and proposals. Unhappiness over price discrimination by suppliers was expressed by representatives of small shoe repair shops, independent tire dealers, and retail druggists. The Committee expressed its approval of a proposal to require sellers in interstate commerce to maintain records of their price systems open to inspection. *Id.* at 26. The same Committee's later report on Antitrust Law Enforcement by the Federal Trade Commission and the Antitrust Division, Department of Justice, H.R. REP. No. 3236, 81st Cong., 2d Sess. (1951), contains an analysis of the Commission's methods. Aside from recommendations for the elimination of delays and failure to enforce its decrees on the part of the Commission, the Committee recommended that orders under the Clayton Act, like those under the Federal Trade Commission Act as amended, be made enforceable by suits for penalties and that the Commission be given power to extend cease-and-desist orders to other firms than a particular respondent, that the Commission be empowered to include affirmative requirements in its orders, and that it receive authority to issue general regulations applicable to entire industries. *Id.* at 28-30.

¹⁰⁴Gordon, *supra* note 3. See also the accounts of pricing in selected industries contained in HAMILTON, PRICE AND PRICE POLICIES (1938). The concluding chapter, which summarizes "The Politics of Industry," is a classic statement. "... [P]rice—and the costs which attend it—are a pecuniary reflection of the usages which impinge upon the making and marketing of a good. These usages . . . are embedded

tific" determinations upon those who are habituated to such a system is to undertake an all but impossible task.

If success could be achieved, its burden might be heavy indeed, in terms both of price rigidity and of protection to inefficient methods of distribution. Competent testimony is in substantial accord to the effect that "administered" prices, which sellers announce and change in their discretion, are resistant to open, uniform reduction because of fear of "spoiling the market" for the future and of desire to exploit continued full-price opportunities even if concessions must be made to gain or hold other business. Hence, in periods when prices may decline, they are likely to be "softened" through discriminatory concessions to some buyers. In so far as the Robinson-Patman Act operates to prevent such discriminations, it is likely to be a force for keeping prices up.¹⁰⁵

To a considerable extent, also, the rule of non-discrimination is one which fastens more securely upon consumers than otherwise the high prices which at least sometimes go with demand stimulated by advertising. The effect of the *Minneapolis-Honeywell* decision of the Federal Trade Commission,¹⁰⁶ for example, as the Commission's report shows, is mainly to enforce the due distribution of opportunity to share in a premium price built up by advertising. Although it is true that by removing his brand and charging all of his current advertising expense to other sales the manufacturer might work out a cost justification for a price differential, such a method is often hardly practicable. It seems highly questionable in any event whether the mechanism of federal enforcement should be directed to no more substantial end than to distribute sellers' benefits from advertising equitably, so long, at least, as overweening monopoly power has not been built up.¹⁰⁷ A better policy would be, rather, to encourage distribution which dispenses with such costs; and it may not be feasible in many instances to insist upon complete elimination of the effects of previous advertising as a condition of doing so. So long as alternative sources of supply are

in the ways of an industry just as the folkways are embedded in the culture of a primitive or a civilized people. Each of these customs . . . has a capacity for development or regression, is modified by the endless series of transactions which it helps to envelop, and may be called upon to give way to an alternative." *Id.* at 542-43.

¹⁰⁵Thorp, *Possible Effects of the Robinson-Patman Act on Business Practices*, Dun & Brad. Monthly Rev., July, 1936, p. 5; EDWARDS, *MAINTAINING COMPETITION* 162 (1949).

¹⁰⁶*Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948).

¹⁰⁷There is, of course, limited monopoly power incident to "monopolistic competition" built up by advertising and other means of attaching business to a given enterprise with some degree of assurance of its continuance. The regulation of monopoly, however, can and should be adapted to the various kinds and degrees of monopoly which are known to exist.

reasonably available, purchasers of commodities for resale should be encouraged so far as at all possible to discover substitutes for submission on their part to unsatisfactory pricing by suppliers, as the "voluntary" chains and locally-owned supermarkets have to a large extent done.¹⁰⁸ Public-utility concepts are hardly applicable. By the same token, the privilege of participating equitably in the advertising itself through "services" or payment for them is perhaps not so indispensable as to require legislative regulation for its accomplishment.

Current consideration of possible measures for improving the Government's handling of the price and service discrimination problem is disappointingly unproductive of proposals of a fundamental nature. Outright repeal of some of the most significant aspects of the Robinson-Patman Act has been suggested, partly because of Judge Lindley's expressed doubt in the *A & P* case "whether we ever needed" the Act, "with all its elusive uncertainty";¹⁰⁹ but there is no great force behind the suggestion, and it has not been made with recognition of the numerous difficulties that would remain unsolved. Proposals for improvement in details of the statute have been numerous and mainly meritorious.¹¹⁰ Active legislative consideration has been given, on the one hand, to proposals for strengthening enforcement of the existing policy of the Act¹¹¹ and, on the other hand, to measures that would render enforcement more difficult, which court decisions have provided the occasion for promoting.¹¹² The existing policy and its administration have not been reexamined, however, with a view to devising new measures for realizing its valid elements while sloughing off those that are invalid.

It seems clear that the evil which is sought to be reached by the Robinson-Patman Act and which requires legislation supplementary to the Sherman Act because that Act does not reach it is the victimization of distributors, usually small distributors, in situations where the number of suppliers with whom they can deal is quite limited, by

¹⁰⁸See Fulda, *supra* note 5, *passim*. In some lines of business, such as the shoe repair trade, where most enterprises are extremely small and the personnel hardly in a position to display originality and co-operativeness, special protective measures may become necessary.

¹⁰⁹*United States v. New York Great A. & P. Tea Co.*, 67 F. Supp. 626, 676 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949).

¹¹⁰See articles in CCH ROBINSON-PATMAN ACT SYMPOSIUM (1948), cited in OPPENHEIM, PRICE AND SERVICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 62 (1949).

¹¹¹See note 103 *supra*. S. 1544, 82nd Cong., 1st Sess. (1951), would, in addition to amending the antitrust laws in other ways, require sellers to make known to all customers and available to them on the same terms, all terms of sale offered to any one of them.

¹¹²See note 102 *supra*.

discriminatory practices on the part of those suppliers. These practices may result primarily either from the initiative of these suppliers in the struggle for business among them or from the pressure of powerful buying organizations. In the first type of situation the Sherman Act provides traditional remedies which either the Government or injured suppliers can invoke; and the Government has been successful under that Act in the *A & P* case¹¹³ in the second type of situation. Relief through these channels is likely to be uncertain and slow, however, and in the meanwhile the injured small distributors remain substantially remediless in the absence of some supplementary corrective action or means of redress. It should be possible to provide relief in this type of situation without imposing mechanical rules which are difficult of enforcement on distribution generally and, in the process, without giving shelter to wasteful and inefficient methods of marketing. It is believed that relief of a discriminating type might be provided if the rule-making power of the Federal Trade Commission, for which the Robinson-Patman Act provides a slight beginning, were enlarged and guided by suitable statutory terms.

The present rule-making provision of the Robinson-Patman Act relates only to the setting of "quantity limits," which the Commission may establish after due investigation and hearing as to any commodity or class of commodities, "where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce." When the Commission has done so, price differentials based on differences in quantities greater than those specified by the Commission will not be permitted.¹¹⁴ Only since World War II has the Commission proceeded under this provision, and no limits have as yet been finally prescribed. The pending proceeding relates to the rubber tire industry. In its Notice of Proposed Rule Making, the Commission indicated that it had in mind establishing a carload lot of tires as the largest amount on which a discount because of quantity could be allowed.¹¹⁵ While such a rule might be desirable in the rubber tire industry, the carload limit on railroad rate concessions on account of quantity, which the Interstate Commerce Commission has maintained under the Interstate Commerce Act and to which the Federal Trade Commission alluded,¹¹⁶ hardly constitutes a persuasive analogy.

¹¹³United States v. New York Great A. & P. Tea Co., 67 F. Supp. 626 (E.D.Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949).

¹¹⁴49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946).

¹¹⁵14 FED. REG. 6044 (1949).

¹¹⁶*Ibid.*

It would certainly be unfortunate if quantity limits in industries that became subject to rules on that subject were to be frozen into a carload formula. Yet the mere power to set quantity limits is not a sufficiently flexible regulatory device to enable the Commission to do appreciably better.

What is needed instead is a statute in place of the Robinson-Patman Act which provides in effect that the Commission may, after investigation and hearing, issue regulations as to differences in price on account of quantity, allowances for services by buyers, or services by sellers to buyers, in respect to the sale of any commodity or class of commodities in interstate commerce, with regard to which the Commission finds that discriminations in prices, service allowances, or services exist and that the available sources of supply to buyers in any market or markets are so few and are coupled with such prevalence of discriminatory practices as to cause these buyers to encounter substantial difficulty in competing on an equal basis. Freed from preoccupation with the practices of individual sellers, the Commission might then devote its energies to appraising significant market situations involving discrimination and to devising suitable remedies to preserve competition in distribution without underwriting existing wasteful practices. Its regulations might, when feasible, specify cost bases for price differences, together with cost accounting methods for administering them, rather than simply stating rigid quantity limits—although these need not be excluded when appropriate. The regulations might be nationwide in operation or be confined to geographical areas in which harmful discriminations, growing out of interstate commerce, existed. For much American distribution, regulations would be unnecessary, since alternative sources of supply are coupled with sufficient opportunities for distributors to develop new methods, so that healthy competition may be maintained without regulatory intervention.

The success of any such approach would, of course, depend upon a tradition and methodology in the regulating agency and a willingness on the part of Congress to support such an approach, sufficient to enable the agency actually to keep in touch with market situations resulting from interstate commerce and to devise realistic measures for the correction of unhealthy conditions. Such a state of affairs perhaps awaits the millenium; but in the meanwhile there is need for suggestions to improve the present situation.